IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 33

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE and GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

BRIEF OF RESPONDENT COMPANIA TRASATLANTICA ON THE MERITS

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Statement of the Case

The petitioner is a Spanish subject (R. 2a). He was in the employ of the respondent Compania Trasatlantica, also known as Spanish Line, as a seaman and member of the crew of the *"Guadalupe"* at the time he was injured (R. 4a). Compania is a Spanish Corporation, incorporated under the laws of Spain (A. 27a, A. 33a) and is the owner of the *"Guadalupe"*, (R. 5a). This vessel is registered under the laws of Spain and flies the flag of Spain (A. 27a, A. 34a).

References to the "appendix for appellant" are by the letter "R".

References to the appendix for appellee are by the letter "A".

The voyage on which petitioner was injured commenced in Spain. The *"Guadalupe"* left the port of Bilbao and after calling at several other Spanish ports sailed for North American ports calling in order at New York, Havana and Veracruz, then returning back through the ports of Havana and New York and back to its final port of discharge in Spain (R. 23a-R. 26a). While the vessel was enroute through the port of New York on its return voyage to Spain, petitioner was injured (R. 26a). At the time of the accident the vessel was actually docked at Pier 2, Hoboken (R. 198a).

The accident occurred May 12, 1954. Prior thereto and on October 9, 1953, petitioner signed on the *"Guadalupe"* under articles of agreement (R. 167a) providing, in their parts pertinent here, (Compania Trasatlantica's Ex. "A", R. 81a, A. 18a-23a):

> "In the port of Bilbao, on the 9th. of October, 1953, Mr. Eusebio Aguirre Gavina, native of Baracaldo, province of Biscay, with domicile at Portugalette, 46 years of age, Captain of the Spanish steamer *'Guadalupe'*, registered at Barcelona, by his own rights and in representation of the Ship-owners of said vessel, 'Compania Trasatlantica', with domicile at Barcelona, and Mr. Francisco Romero Onteirol, 32 years of age, native of Rebordelo, province of Corunna, by profession Deck Hand, whose identity was checked by the corresponding pass-book, agree to sign the present contract in compliance with the following conditions and both parties subject to the provisions established by the Codes of Laws regu-

lating Commerce and Labor as also all other regulations in force. (A. 18a)

* * * . .

22) In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurances as determined by the Laws." (A. 22a).

Under Spanish law and regulations each seaman signs an individual contract or articles of agreement (R. 14a-R. 15a, A. 18a-A. 23a).

Petitioner thus expressly contracted that in the event of injury his rights against his employer, Compania Trasatlantica, were to be those provided for in the Spanish Codes of Laws, and the other regulations in force.

Spain is exclusively a Code Country. Common law is non-existent in Spain and, accordingly, no General Admiralty Law exists there such as there is here in this country (R. 76a-77a, 136a). Petitioner was injured on the third round voyage of the *"Guadalupe"* following his signing of his Articles of Agreement on October 9, 1953. It was established by the expert on Spanish Law, called as a witness by respondent, that the conditions and provisions of the Articles of Agreement were binding on petitioner when he was injured (R. 46a-59a). It could not very well be denied as the law of Spain provides (R. 46a):

"The contracts, although limited for one trip, if the workman remains working he becomes a

steady worker, a permanent worker, and the clause referring to the time is converted into indefinite time, and so the contract is extended indefinitely."

Petitioner's rights under Spanish Law against his employer for injury are exclusively under the Spanish Workman's Compensation Law (R. 78a). Under the Workman's Compensation Law of Spain, petitioner will receive between 35 and 50 percent of his salary for life for the injury he sustained and if his employer is found to have been negligent, his compensation award can be increased 50 percent (R. 77a-R. 78a, R. 134a). In addition, the expenses of his hospitalization, treatment, cure and maintenance are paid (R. 71a-R. 72a, R. 124a, R. 139a).

Petitioner's rights being exclusively in compensation, he cannot maintain suit against his employer (R. 78a, R. 134a). Respondent Compania Trasatlantica, as required by Spanish Law, had insured its liability in compensation to petitioner as well as its liability for maintenance and cure (A. 27a, A. 34a). The fund for the payment of his compensation for life has long since been established (R. 77a). He was recovered sufficiently from his injury by July 10, 1954 to be repatriated to Spain and repatriation was tendered to him by respondent (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a, R. 91a). The bill of his attending physician was paid by respondent to that date (R. 185a, R. 186a). And the hospital at which he was treated was informed by respondent in writing that if it would render a bill to that date it would be paid by respondent (R. 91a, R. 113a-R. 115a, Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a).

The hospital at which petitioner was treated has never rendered a bill to respondent or its agent for treatment to July 10, 1954 although, as stated, it was advised by letter that if it did the bill would be paid by respondent (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a) and although advised again on the trial it would be paid by respondent (R. 91a, R. 113a). Important in point, in view of the contrary assertions in petitioner's brief, is the fact that the hospital at which petitioner was treated was also advised that in view of petitioner's ability to travel and be repatriated on July 10, 1954, respondent could not guarantee any of its bills beyond that date (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-25a). Respondent could not commit its insurer to charges here beyond that date for if it did it could not be reimbursed for those charges by its compensation insurer (R. 91a). Petitioner was tendered repatriation on a vessel of respondent carrying a competent and able ship's physician and would receive the best medical care and rehabilitation on his arrival in Spain under the direction of respondent's compensation insurer (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a).

Refusing to accept respondent's offer of repatriation petitioner continued in a hospital here incurring wholly unnecessary charges and refused to accept compensation under Spanish law, although fully aware that his employer would repatriate him to Spain where his compensation rights could be availed of and also although fully aware that his rights in Spanish Workman's Compensation could be administered by the Spanish Consul here in New York (R. 59a, R. 136a), if he desired to have them administered here.

Instead, petitioner instituted this suit against respondent just twelve days after his injury occurred or on May 24, 1954, (R. A., Docket entries).

Additional respondents named in the suit are:

International Terminal Operating Co., a Delaware corporation;
Garcia & Diaz, Inc., a New York corporation;
Quin Lumber Co., Inc., a New York corporation.
(R. 2a-R. 4a)

The suit by petitioner, in so far as it was brought against this respondent was brought to recover:

1. Maintenance and cure and wages to the end of the voyage;
2. Damages under the General Admiralty Law, and
3. Damages under the Jones Act.

(T. 46 U. S. C. A., sec. 688).
(Amended Complaint, R. 196a-R. 206a).

Respondent, by way of affirmative defense in its answer to petitioner's Amended Complaint, pleaded (R. 214a-R. 215a):

"First Defense

18. This Court does not have jurisdiction of this or any suit between this plaintiff and it.

Second Defense

19. This Court does not have jurisdiction of the subject matter of this action between this plaintiff and it.

* * *

FOURTH DEFENSE

21. The plaintiff is a Spanish National and resident of Spain. The vessel on which he was injured is of Spanish registry and ownership. The agreement under which he sailed was signed in Spain for a round-trip voyage from Spain. The plaintiff by agreement with this defendant agreed that all claims for injuries sustained while in the employ of this defendant were to be controlled, governed, adjudicated, dealt with and fall under the Laws of Spain and particularly the compensation Laws of Spain and were to be adjudicated in Spain or before a representative of the Spanish Government and by said laws and said agreement and by Treaty or Treaties between between the United States and Spain. Plaintiff's sole rights are governed thereby and by his contract and plaintiff is limited in asserting those rights as aforestated; that this action cannot be maintained here; that this plaintiff cannot maintain suit against this defendant under the Jones Act or the General Maritime Law of the United States; that plaintiff's sole remedies against this defendant are as aforestated and must be asserted in Spain or before a representative of the Spanish Government."

Prior to this suit being assigned for trial, respondent moved, on the basis of these defenses, to dismiss the suit as against it.

The District Court set this motion for a preliminary hearing (R. 2a, R. 7a-R. 9a, R. 29a, R. 87a-R. 88a, R. 101a, R. 194a).

Although petitioner now suggests objection was made to such preliminary hearing, his counsel of record stated at the commencement thereof (R. 18a):

> "The Court: I don't understand the basis of your objection. Are you objecting to my proceeding with the pretrial hearing?
>
> Mr. Puente: No. My objection is to the manner in which it is going, although your Honor is being very fair. * * *".

Questions Presented

The principal question presented by Compania Trasatlantica in the Courts below was whether petitioner could maintain this action for damages against it under the Jones Act and under the General Admiralty Law of the United States and that is the question with which this respondent is principally concerned on this appeal to this Court. If the holdings of the lower courts on this question are affirmed by this Court, then the matter as to this respondent is at an end.

Should this Court determine that although petitioner cannot maintain suit under the Jones Act he can maintain suit against this respondent under the General Admiralty Law of the United States then the question of whether such action can still be maintained on the Civil or Law side of the court in the absence of complete diversity between petitioner and all the respondents is presented. Further questions presented by this respondent are:

Whether this petitioner can in any event be permitted to maintain suit against this respondent where

to permit him to do so subjects this respondent to a double responsibility and possibly a double liability for a single injury.

Whether a full trial on the merits was a prerequisite to a consideration by the District Court of the defenses of "lack of jurisdiction of the subject matter" and "failure to state a claim upon which relief can be granted".

Whether the questions of Spanish law were questions of fact for a jury or questions to be decided by the Court alone.

Whether the abrogation of articles VI and XXIII of the Spanish Treaty created any right in the petitioner to maintain suit against this respondent under the Jones Act or under the General Admiralty Law of the United States.

Whether the District Court properly declined discretionary jurisdiction in admiralty.

Summary of Argument

The argument presented by respondent Compania Trasatlantica in this brief can be summarized as follows:

Respondent argues that this Spanish seaman, sailing on a Spanish flag vessel, and under Spanish articles of agreement signed in Spain and providing that in the event of injury his rights against the vessel owner are to be governed by Spanish Law cannot maintain suit against it under the Jones Act (Section 688 of Title 46 U. S. C.) or under the General

Admiralty Law of the United States. This Court in *Lauritzen* v. *Larsen*, 345 U. S. 571, decided May 25, 1953, determined that a foreign seaman on a foreign flag vessel under foreign articles of agreement providing that his rights against the vessel owner were to be governed by Danish law, could not maintain suit against his employer under the Jones Act, and this despite the fact that the seaman signed the articles in a United States port. The *Lauritzen* case differs from the present case only in that:

1. The seaman in the *Lauritzen* case was injured in a foreign port whereas the petitioner here was injured in a United States port;

2. The seaman in the *Lauritzen* case brought suit only under the Jones Act whereas petitioner here has brought suit under both the Jones Act and the General Admiralty Law of the United States.

It is the position of respondent Compania Trasatlantica that the provision of petitioner's articles of agreement or contract with it, that in the event of injury, his rights against it should be governed by Spanish Law, should be honored and enforced by the courts of this country even though his injury occurred in a United States port; that in any event the Jones Act was never intended by title or by wording to apply to claims or suits by foreign seamen on foreign vessels under foreign articles even though the seaman sustained injury in a United States port; that to permit petitioner to maintain this suit either under the Jones Act or under the General Admiralty Law of the United States will "bring us in conflict with the maritime world" (*Lauritzen* case, supra),

and would require a complete disregard of the contract or articles of agreement entered into between petitioner and respondent; that the enforcement of petitioner's contract or articles of agreement in no way violates the public policy of the United States and their enforcement is in accord with the settled American doctrine that matters of discipline and things occurring on board a foreign flag vessel which do not involve violation of the peace or dignity of our country or the tranquility of our ports should be left to be dealt with by the laws of the nation of the vessel's flag.

Subsidiary to but allied with the foregoing is the fact that to allow petitioner to maintain this action subjects respondent to a double responsibility and possibly a double liability for a single injury. The Spanish law provides full compensation to petitioner for his injury and a life pension has been established under Spanish law for him and awaits only his asking in Spain or at the Spanish Consulate in New York. This life pension cannot be denied him. Should he be permitted to maintain this action in our courts under our law and should he effect recovery in this action he will have effected a double recovery for a single injury and imposed a double liability for that single injury on this respondent.

Dealt with further in the argument in this brief is the right of the District Court to inquire preliminarily and before a trial on the merits into the right of this petitioner to maintain suit under the Jones Act or the General Admiralty Law of the United States. Petitioner questions the right of the District Court to conduct this inquiry or hearing. This re-

spondent asserts that by the wording of Rule 12 of the Federal Rules of Civil Procedure such inquiry is fully authorized. Petitioner also asserts that the question of Spanish Law which arose on the preliminary hearing was a question for the jury. Respondent argues herein that such a question is one for the Court and submits that this is fully substantiated by authoritative decisions.

Somewhat vaguely petitioner argues that the abrogation of Article VI and of Article XXIII of the Treaty between the United States and Spain created in or restored in petitioner a right to maintain suit against respondent under the Jones Act and under the General Admiralty Law of the United States. It is respondent's argument that neither of these Articles of the Treaty either created nor cut off any such rights in petitioner and their abrogation, accordingly, neither restored nor created any such right in him.

At the conclusion of the preliminary hearing, the District Court declined discretionary jurisdiction in admiralty. This was because it had been clearly shown that petitioner had been awarded complete compensation for his injury under Spanish Law. The action of the District Court in this regard is fully substantiated by the authorities and particularly by the decision of this Court in Canada Malting Co. *Ltd.* v. *Paterson Steamship Co., Ltd.*, 285 U. S. 413.

ARGUMENT

POINT I

The decision of this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571, is decisive of the question of petitioner's right to maintain this suit against respondent Compania and required a dismissal of the complaint as against it.

In *Lauritzen* v. *Larsen*, 345 U. S. 571, decided May 25, 1953, this Court had before it the suit of a foreign seaman on a foreign flag vessel under foreign articles of agreement (but signed in the United States) providing that his rights against his vessel owner employer were to be governed by Danish Law. This Court in concluding that his articles of agreement were binding on him, and that he could not maintain suit under the laws of the United States, stated (pp. 584-586):

> "2. Law of the Flag.—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose the character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. United States v. Flores, 289 U. S. 137, 155-159, and cases cited. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in United States v. Flores, supra, at 158, and iterated in Cunard Steamship Co. v. Mellon, supra, at 123:

> 'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws

> of that nation or the interests of its commerce should require . . .'
>
> This was but a repetition of settled American doctrine.
>
> These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears."

These conclusions are even more applicable in the present litigation for here petitioner's Articles of Agreement were entered into in Spain and were for a round trip voyage from Spain and return thereto. They likewise provided specifically that petitioner's claims for injury were to be governed by Spanish Law (A. 22a):

> "22) In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurances as determined by the Laws."

The "Laws" referred to in the foregoing provision of petitioner's Articles of Agreement are the "Codes of Laws Regulating Commerce and Labor as also all regulations in force" referred to in the first paragraph of the Articles of Agreement (A. 18a).

No "heavy counterweight" appears weighing against holding petitioner bound by his Article of Agreement in which he agreed that in the event of injury his rights against respondent would be governed by applicable Spanish Law. And, there is

nothing in the public policy of the United States mitigating in the least against the enforcement of these provisions of petitioner's Articles of Agreement. What was said by this Court in the *Lauritzen* case, supra, on this point is as applicable in the present case as it was there (pp. 588-589):

> "But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the contract with the Danish union were to control. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high-seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. The Belgenland, 114 U. S. 355, 367; The Hanna Nielsen, 273 F. 171".

The history of the Jones Act was reviewed at great length in the *Lauritzen* case, supra. This Court there recognized that the Act was passed by Congress in 1920 under the title "An Act to Provide For the Promotion and Maintenance of the American Merchant Marine * * *" (p. 580) and that it merely amended the La Follette Act, passed by Congress in 1915 and entitled "An Act to Promote the Welfare of American Seamen in the Merchant Marine in the United States * * *" (p. 579). This Court further

recognized that it was never, either by title or its wording, intended to apply to foreign seamen on foreign vessels and that there was no justification for interpreting it to intervene between foreigners and their own law (p. 593) and that to apply the Jones Act in such a situation "would bring us in conflict with the maritime world" (p. 592). The Act was passed to promote the "American Merchant Marine" and to promote the "Welfare of American seamen" and was never intended to apply to foreign seamen on foreign ships.

There can be no justification for interpreting the Jones Act to intervene between this foreign seaman and foreign vessel owner simply because the occurrence involved took place in an American port. To do so or to apply the General Martime Law of the United States here would as equally and effectively "bring us in conflict with the maritime world". To do so would involve and require a complete disregard of the provision of the Articles of Agreement between petitioner and respondent wherein it is provided that in the event of injury to petitioner his rights against respondent are to be governed by Spanish Law.

In the *Lauritzen* case, supra, the fact that Articles of Agreement were signed in New York was found to be completely offiset "by provisions of his contract that the law of Denmark should govern" (p. 592). Here the fact that the accident occurred in a United States port is likewise completely offset by the provisions of petitioner's contract that the law of Spain should govern (A. 22a).

No inconvenience, hardship or injustice can result to petitioner by the enforcement of his contract. He

is entitled under Spanish Law to between 35% and 50% of his salary for life and if his employer is found to have been negligent his compensation award can be increased 50% (R. 77a-R. 78a, R. 134a). The fund for the payment of his compensation award has long been established (R. 77a). The expenses of his hospitalization, treatment, cure and maintenance are required to be paid by Spanish Law (R. 71a-R. 72a, R. 124a, R. 139a). When he was fit for repatriation to Spain, repatriation was offered him by respondent (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a, R. 91a). It was refused by him. But his rights under Spanish Law can be asserted here before the Spanish Consul (R. 59a, R. 136a). He has failed and refused to avail himself either of repatriation to Spain where he might assert his rights under Spanish Law or to present himself to the Spanish Consul here in New York and have his rights administered. Instead he instituted this suit against respondent twelve days after his accident (R. A. Docket entries). The hospital at which he was treated was advised that its bill to the date when petitioner was fit for repatriation would be paid if presented. The hospital has to this time failed to bill respondent to that date (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a, R. 91a; R. 113a).

In point in this connection is the language of this Court in the *Lauritzen* case, supra (p. 590):

> "Confining ourselves to the case in hand, we do not find his seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed,

prolonged, expensive and uncertain litigation. It is stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner."

The injury to petitioner concerns only petitioner and respondent and the internal economy of the vessel. Enforcement of petitioner's Articles of Agreement will not, therefore, involve violation of the peace or dignity of this country, the tranquility of our ports, or our public policy. Settled American doctrine, accordingly, requires that the rights and responsibilities of petitioner and respondent be governed by the law of Spain. This Court recognized the necessity of this rule in the *Lauritzen* case, supra, saying there (pp. 585-586):

"It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in United States v. Flores, supra, at 158, and iterated in Cunard Steamship Co. v. Mellon, supra, at 123:

'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of

the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . .'

This was but a repetition of settled American doctrine.

These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears."

The question of the rights of a foreign seaman on a foreign flag vessel, under foreign articles, to bring suit under the laws of the United States for injury sustained in a United States port has often been considered. Without exception the holdings have been that such a suit cannot be maintained.

Gambera v. *Bergoty*, 132 Fed. 2d 414, Second Circuit, 1942, cert. denied, 319 U. S. 742:

"At the outset we pass it as irrelevant that the libellant is an enemy alien (Petition of Bernheimer, 3 Cir., 130 F. 2d 396), and proceed to the merits. Section 33 of the Jones Act, §688, Title 46 U. S. C. A. does not use the word 'citizen'; it gives relief to 'seaman' eo nomine, leaving it to the courts to define the term more closely. We decided in The Paula, 2 Cir., 91 F. 2d 1001, that a German citizen who had signed the articles in Germany and shipped as a member of the crew of a German ship, could not avail himself of the act. He had chanced to suffer injury while she

was in the harbor of New York, a port of call upon a voyage beginning and ending in Germany. The same ruling was made in The Magdapur, D. C., 3 F. Supp. 971, and by Judge Goddard in *Plamals* v. *S. S. Pinar del Rio,* 1925 Am. Mar. Cas. 1309, affirmed in 2 Cir., 16 F. 2d 984, and affirmed on other grounds in 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827. We regard The Seirstad, D. C., 27 F. 2d 982, and *Hogan* v. *Hamburg-American Line,* 152 Misc. 405, 272 N. Y. S. 690, as overruled by *Uravic* v. *F. Jarka Co.,* 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312; but we also regard it as settled law that alien seamen serving upon foreign ships owned by aliens, and bound upon a voyage which begins and ends outside the United States, cannot sue under the Jones Act for injuries suffered while the ship happens to be stopping at a port of call within our territorial waters" (p. 415).

The Paula, 91 F. (2d) 1001, Second Circuit, 1937:

"The libelant claims not only under the maritime law but also under section 33 of the Jones Act (46 U. S. C. A. §688). He asks us to rule that this applies to an alien seaman on a foreign ship who signed on at a foreign port, if he sustains injury in a port of the United States through the negligence of a fellow seaman. This question was expressly left open in *Plamals* v. *Pinar Del Rio,* 277 U. S. 151, 155, 48 S. Ct. 457, 72 L. Ed. 827. Precise authority on it is meager. Such as there is has answered the question in the negative" (p. 1003).

The Ivaran, 35 Fed. Supp. 229, S. D., N. Y., 1940:

> "The facts briefly are as follows: Libelant is a citizen of Norway; he signed articles of employment for the ship Ivaran in Norway; he was sent to this country to join the ship sometime during the latter part of 1939. He became a member of the crew at New York City in December, 1939, and a short time thereafter, while the vessel was at Baltimore, he was injured. In the ship's articles, signed by libellant, he agreed that his employment on the vessel should be governed by the terms of the Norwegian law.
>
> Under the law of Norway, a seaman is entitled to recover for his injury, compensation from the Royal Insurance Fund, which is in the nature of compensation insurance and which is exclusive. The pertinent section of the Norwegian law which is applicable is as follows: 'Shipowners, Masters and others who command on board incur no liability, either personally or with the value of the ship and freight, for accidents which come within the cognizance of the present Law, except when it is proved by a criminal sentence that the injury was caused purposely or by gross inadvertency.' (§28, Section 1, Laws of June 24, 1931 of the Kingdom of Norway)" (p. 230).

The Court of Appeals, Second Circuit, in affirming the dismissal of the libel in that case, said (121 Fed. 2d 445, at page 446):

> "PER CURIAM.
>
> Dismissal of the libel is affirmed on the authority of The Paula, 2 Cir. 81 F. 2d 1001, certiorari denied, *Peters* v. *Lauritzen*, 302 U. S. 750, 58 S.

Ct. 270, 83 L. Ed. 580. Affirmance, however, is without prejudice to renewal of the suit in the event that the remedy available to the seaman by presentation of his claim to the Norwegian Consulate in New York should prove to be non-existent."

In *Taylor* v. *Atlantic Maritime Co.*, 179 Fed. 2d 597, cert. denied, 349 U. S. 915, 1950, the Court of Appeals, Second Circuit, stated:

"* * * On the other hand, if the seaman is serving on a foreign ship, and if in addition he has signed articles in a foreign port, obviously there can be no recovery either in tort or in contract, even though, as in The Paula, supra, the injury happens on board ship in an American port" (p. 598).

In 1951 Judge Irving R. Kaufman in *Catherall* v. *Cunard S. S. Co.*, 101 Fed. Supp. 230, S. D., N. Y., said:

"The objection to the court's jurisdiction of the Jones Act cause of action is well taken. Plaintiff is a foreign national who signed aboard a foreign ship in a foreign country, for a voyage beginning and ending in a foreign port. Even if the injury occurs in United States waters, under these circumstances plaintiff is allowed no recovery. The Court of Appeals for this Circuit has repeatedly affirmed this holding. The Paula, 2 Cir. 1937, 91 F. 2d 1001; *O'Neill* v. *Cunard White Star Ltd.*, 2 Cir., 1947, 160 F. 2d 446; *Taylor* v. *Atlantic Maritime Co.*, 2 Cir. 1950, 179 F. 2d 597. Those cases in which a foreign

seaman *has* been allowed access to the Jones Act are not in point. *Gambera* v. *Bergoty*, 2 Cir. 1942, 132 F. 2d 414, concerned a long-time resident alien of the United States serving on a ship in the United States intercoastal traffic. *Kyriakos* v. *Goulandris*, 2 Cir. 1945, 151 F. 2d 132, was the case of a seaman who signed aboard a foreign vessel, in the United States, for a voyage beginning and ending in the United States" (p. 232).

See also:

Nakken v. *Fearnley & Eger*, 137 F. Supp. 288, (S. D., N. Y., 1955);
Smith v. *Furness, Withy & Co.*, 119 F. Supp. 369, (S. D., N. Y., 1953);
Rankin v. *Atlantic Maritime Co.*, 117 F. Supp. 253, (S. D., N. Y., 1953).

POINT II

To allow petitioner to maintain this action against respondent would subject it to a double responsibility and possibly a double liability for a single injury.

Respondent's responsibility to petitioner has long since been fixed and determined. The fund for the payment of a life pension to him has been established (R. 77a) under Spanish Law. The expert on Spanish Law called by respondent on the hearing is the attorney for the Instituto Nacional where petitioner's life pension has been established. He examined petitioner's file before leaving for this country to testify at this trial, and testified to these facts (R. 77a). Petitioner's life pension awaits merely his asking in

Spain or at the Spanish Consulate in New York (R. 59a, R. 136a). It cannot be denied him. Petitioner does not have an election under Spanish Law to either take compensation or bring suit against respondent. His sole right against respondent is in compensation (R. 78a, R. 134a). To allow him to maintain this action against respondent subjects respondent to a double responsibility and possibly to a double liability for a single injury.

POINT III

A full trial on the merits was not a pre-requisite to a consideration of respondent's motion.

Petitioner contends in Point III of his brief (p. 40) that the mere statement in his complaint of causes of action under the Jones Act and the General Admiralty Law of the United States required a full trial by jury on the merits before consideration could be given to his right to bring suit on these causes of action.

This contention is shortly disposed of by the provisions of Sub-divisions (b) and (d) of Rule 12 of the Federal Rules of Civil Procedure which provide:

> "(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading hereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of juris-

diction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defenses in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Respondent Compania Trasatlantica pleaded the defenses of "lack of jurisdiction over the subject matter" and "failure to state a claim upon which relief can be granted" in its answer (R. 214a-R. 215a).

Respondent having then made "application" for a hearing on these defenses the Court, as authorized by the provisions of subdivision (d), "heard and determined" these "defenses", "before trial".

POINT IV

The questions of Spanish Law were not jury questions but were questions of law for the Court.

A full trial of the applicable Spanish Law was had, respondent producing and placing this law in evidence and producing an expert on Spanish Law (R. 43a-R.79a) and petitioner's counsel placing in evidence such Spanish Law as he contended applicable and also producing an expert on Spanish Law (R. 118a-R. 164a). The questions of Spanish Law presented on the hearing were not jury questions but were questions of law for the Court. This is clearly established by the following authorities:

Liechti v. *Roche*, 198 F. 2d 174 (Fifth Circuit, 1952):

> "Several applicable principles of law are too well settled to admit of serious dispute. The court is called upon to enforce a cause of action that has arisen under and been created by the law of the Republic of Panama, Cuba R. R. Co. v. Crosby, 222 U. S. 473, 478, 32 S. Ct. 132, 56 L. Ed. 274. The measure of damages, as well as

the right to recover, is governed by the *lex loci delictus* Western Union Telegraph Co. v. Brown, 234 U. S. 542, 547, 34 S. Ct. 955, 58 L. Ed. 1457; Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900. Neither the District Court nor this Court takes judicial notice of the laws of the Republic of Panama but such foreign laws must be pleaded and proved as facts, Cuba R. R. Co. v. Crosby, 222 U. S. 473, 479, 32 S. Ct. 132, 56 L. Ed. 274; Mexican Central Railway Co., Ltd. v. Chantry, 5 Cir., 136 F. 316, 322.

There is considerable controversy whether the proof of foreign law should be addressed to and the state of the foreign law determined by the court or by the jury, 53 Am. Jur., Trial, Sec. 241. The cases on the subject are collected in annotations in 34 A. L. R. 1447 and 68 A. L. R. 809. Professor Wigmore states that, '* * * the only sound view, either on principle or on policy, is that it (foreign law) should be proved to the judge, who is decidedly the more appropriate person to determine it'. 9 Wigmore on Evidence (3d ed.) Sec. 2558. In a footnote to that text Professor Wigmore continues: 'The decisions seldom lay down either rule absolutely, owing in part to the desire to retain the principle of the Court's construction of documents * * * while recognizing the jury's function of crediting the evidence; but there is no necessity here for conceding anything to the latter; * * *. (p. 176)

* * *

We conclude that it was the judge's function to determine the state of the foreign law, and hence that the District Court did not err in de-

clining to submit to the jury the issue of whether compensation for pain and suffering was recoverable as damages under Panamanian law, and did not err in refusing the defendant's proferred instructions 3, 4, 5 and 6." (p. 177).

See also:

Bonsalem v. *Byron S. S. Co., Limited,* 50 F. 2d 114 (Second Circuit, 1931);
Bank of Nova Scotia v. *San Miguel,* 196 F. 2d 950 (First Circuit, 1952);
Jansson v. *Swedish American Line,* 185 F. 2d 212 (First Circuit, 1950).

POINT V

The District Courts on their law side do not have jurisdiction of claims founded on the General Maritime Law of the United States unless diversity between the parties is present.

Dismissal of the Jones Act cause of action required consideration of the question of jurisdiction on the basis of diversity. Admittedly no diversity existed between petitioner and respondent Compania. In an endeavor to overcome this lack of diversity petitioner argues that jurisdiction on the law or civil side nevertheless is present in that cases based on the General Maritime Law of the United States are cases wherein the matter in controversy "arises under the Constitution, laws or treaties of the United States, within the meaning of Section 1331 of Title 28 of the U. S. Code". This argument was rejected by the District Court (R. 252a) on the authority of the de-

cision of the Court of Appeals of the Second Circuit in *Paduano* v. *Yamashita Kisen, et al.*, 221 F. 2d 615, (1955) where Medina, J., writing for that Court said:

> "In view of the persistence of this legislative attitude and in the absence of any indication that there are situations in which it has not prevailed, we are constrained to conclude that the Congress, in enacting Section 1331 and its predecessor provisions, intended to exclude from its scope, cases such as the one now before us, in which the general maritime law is the sole substantive basis for awarding the relief claimed in the complaint." (p. 619)

and where Dimock, J., in a concurring opinion, stated:

> "The choice between these interpretations is dictated by a further provision of the Judiciary Act of 1789. Section 9 of that Act which contains the grant of jurisdiction of 'civil causes of admiralty and maritime jurisdiction' ends with this sentence: 'And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.'
>
> I cannot escape the conclusion that the Congress which made that provision felt that the district courts to which it applied had been given no jurisdiction to enforce the maritime civil law by a common law remedy." (p. 621)

Chief Justice Marshall in *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), set forth the basic distinction between the district court's jurisdiction over cases in law and equity arising under the Constitution,

over cases in admiralty and over cases affecting Ambassadors, stating at page 545:

> "The constitution certainly contemplates these as three distinct classes of cases; and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. *A case in admiralty does not, in fact, arise under the constitution or laws of the United States.*" (Emphasis supplied.)

In *The Belfast*, 7 Wall. 624 (1868), this Court discussed the "savings to suitors clause" and declared (at page 643):

> "Nothing is said about a concurrent jurisdiction in a State court or in any other court, and it is quite clear that in all cases *where the parties are citizens of different States,* the injured party may pursue the common law remedy here described and saved, in the Circuit Court of the district as well as in the State courts." (Emphasis supplied.)

This Court in *The Belfast* then again stated the requirement that diversity of citizenship must exist if an action, based on the maritime law, is to be brought in the federal courts on the civil side (page 644):

> "Property construed, a party under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same juris-

diction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case."

The above principle was restated in *Leon* v. *Galceran,* 11 Wall. 185 (1870), where this Court, in discussing the rights of mariners to recover their wages, again noted that an action of such a nature may be instituted in the federal civil courts only if there is the requisite diversity of citizenship between the litigants (p. 188):

"Where the suit is *in rem* against the ship or ship and freight, the original jurisdiction of the controversy is exclusive in the District Courts, as provided by the ninth section of the Judiciary Act, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may, at his election, proceed in an action at law either in the Circuit Court, *if he and his debtor are citizens of different States* or in a State court as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common law cases, as provided in the eleventh section of the Judiciary Act." (Emphasis supplied.)

Language to the same effect was enunciated by this Court in *American Steamboat Company* v. *Chase,* 16 Wall. 522, 533 (1872) and the foregoing quotation in *Leon* v. *Galceran* was cited with approval by this Court in *Panama R. R.* v. *Vasquez,* 271 U. S. 557 (1926), at page 560, in its discussion of the "savings

to suitors clause" and tortious claims instituted thereunder.

Judge Magruder in *Doucette* v. *Vincent*, 194 F. 2d 834 (First Circuit, 1952), attempted to avoid conflict with these decisions by stating that the language used in the cases of *The Belfast*, *Leon* v. *Galceran*, and *American Steamboat Co.* v. *Chase*, is dictum, as is the language of *American Insurance Co.* v. *Canter*, and that the opinion in the latter case "is not one of his [Justice Marshall] most luminous opinions".

Moreover, the basis of the *Doucette* case is misplaced reliance on language of this Court in *Knickerbocker Ice Company* v. *Stewart*, 253 U. S. 149 (1920), to the effect that the Constitution adopted as laws of the United States approved rules of the general maritime law, and empowered Congress to legislate with respect to them. From this, Judge Magruder reasons that a claim under the general maritime law arises under the Constitution, so as to give a federal district court on the civil side jurisdiction under Section 1331 of Title 28, United States Code. The *Knickerbocker Ice Co.* case dealt only with the authority of Congress to delegate to the several states the power to legislate over maritime matters. Because the Constitution granted this power to the Federal Government, this Court held that the statute in question was unconstitutional. Neither the *Knickerbocker* case nor *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), which was also cited in the *Doucette* case, dealt with the jurisdiction of a district court on the civil side, and there is nothing whatever in these cases which can be relied upon for the proposition that a maritime claim "arises" under the Constitution.

The holding in the *Doucette* case, that a claim founded on the martime law "arises under the Constitution" so as to give jurisdiction to the district court on the civil side, violates a uniform rule existing over a hundred years that a claim cannot be considered as "arising under the Constitution, treaties or laws of the United States", unless it directly involves a construction of a specific constitutional provision, a specific federal statute, or a treaty which is determinative of the claim. *Gully* v. *First National Bank*, 299 U. S. 109 (1936); *Schulthis* v. *McDougal*, 225 U. S. 561 (1912); *King County* v. *Seattle School Dist.*, 263 U. S. 361 (1923); *Bankers Mutual Casualty* v. *Minn. St. Paul, etc.*, 192 U. S. 371 (1904); *New Orleans* v. *Benjamin*, 153 U. S. 411 (1894); *Defiance Water Co.* v. *Defiance*, 191 U. S. 184 (1903); *First National Bank* v. *Williams*, 252 U. S. 504 (1920); *Joy* v. *City of St. Louis*, 201 U. S. 332 (1906); *Porter* v. *Bennison*, 180 F. 2d 523, 525, cert. den. 340 U. S. 817.

In *Jordine* v. *Walling*, 185 F. 2d 662 the Court of Appeals for the Third Circuit reiterated the above rule and demonstrated that an action based on the martime law does not arise under the constitution. The court stated at page 668:

> "Nor does the fact that it was the Constitution which adopted and established the rules of the martime law as part of the law of the United States compel the conclusion that a civil action upon a purely maritime claim is cognizable under that section as one arising under the Constitution itself. For cases arising under the Constitution within the meaning of Article III, Section 2, and Section 1331 which implements it, are only such cases as really and substantially involve a con-

troversy as to the effect or construction of the Constitution upon the determination of which the result depends. Purely maritime cases, such as suits for maintenance and cure, obviously do not involve such a controversy."

It is also the uniform rule that the jurisdictional allegation pleading a claim arising under the constitution, laws or treaties of the United States must appear on the face of the plaintiff's complaint. *Tennessee* v. *Union & Planters Bank,* 152 U. S. 454 (1894); *Joy* v. *City of St. Louis,* 201 U. S. 332 (1906); Moore's Commentary On The United States Judicial Code (1949) pages 227 to 231. An examination of the complaint in this action fails to show even an implication that a specific Constitutional provision is in question.

In the *Doucette* opinion, the court recognized that its position violated the ancient mandate that no claim "arises under the Constitution" unless a specific constitutional provision is directly involved. By a supposition that the Constitution had an express provision preserving rights under the general maritime law, it attempted to avoid the destructive effect which this mandate necessarily had on its conclusion. However, the court was constrained to admit that such a constitutional provision did not exist, but nevertheless, felt that the decisions of the Supreme Court in the "Jensen" (*Southern Pacific Co.* v. *Jensen,* 244 U. S. 205) line of cases remedied this all important defect. However, although decisions of this Court have been held to define and clarify various clauses contained in the Constitution, it has never been suggested, until the *Doucette* case, that deci-

sional law can be relied upon to read clauses into the Constitution which are not therein contained. Moreover, the mandate which the *Doucette* case attempted to avoid has been held to be one of substance and not a mere formality. In *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950), this Court, refering to the rule that a case to "arise" under the Constitution must involve a construction of a clause in the Constitution, stated it has been more careful than in earlier days in enforcing these jurisdictional limitations which are not considered merely technical.

The reference in the *Doucette* case to the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942), illustrates that the first circuit was confusing the jurisdiction of this Court to review an action with the question it was discussing, *viz.* the jurisdiction of the district court on the civil side to entertain an action. In view of the fact that a claim under the "Jones Act" (Title 46, United States Code, Section 688) was made in the *Garrett* case, the assumption in the *Doucette* opinion at page 842, that the Supreme Court reviewed the state court decision in *Garrett* on the ground that there was involved a right "under the Constitution" is unwarranted.

In *Jordine* v. *Walling*, 185 F. 2d 662, the Third Circuit pointed out that a case does not necessarily arise under the Constitution, laws or treaties of the United States within the meaning of Section 1331 of Title 28 United States Code, simply because it involves a "federal question" reviewable by the Supreme Court under Section 1257 (3) of Title 28 United States Code. The Court stated at page 688:

> "It is true that the merits of a common law action upon a maritime claim, if brought in a

state court, are reviewable by the Supreme Court under Section 1257 (3) of Title 28 U. S. C. because a federal question is involved. But it does not follow that such an action may be brought in a federal district court under Section 1331. For it has been held that a case does not necessarily arise under the Constitution or laws of the United States within the meaning of Section 1331 merely because it involves a federal question, i.e., "title, right, privilege or immunity * * * specially set up or claimed under the Constitution treaties or statutes of * * * the United States" which is reviewable under Section 1257 (3). Thus, while a suit for maintenance and cure involves a "right * * * claimed under the Constitution" in the sense that the Constitution made the ancient maritime law, including its doctrine of maintenance and cure, a part of our national law and is thus within the purview of Section 1257 (3), such a suit is not a case which "arises under the Constitution" in the sense of involving a controversy as to the construction of that document and is, therefore, not within the scope of Section 1331."

In addition to the foregoing, a reading of the *Knickerbocker Ice Company, Jensen* and *Garrett* cases shows that, in these cases, this court was basically interested in the establishment of a uniform system of maritime law in the United States and not the expansion of the jurisdiction of the district court. See *Panama Railroad* v. *Johnson,* 264 U. S. 375 page 386 (1924). For this reason, the Supreme Court made the statements in the *Knickerbocker* case and in *Garrett* so heavily relied upon by the court in *Doucette* v. *Vincent.* We believe that a reading of these opinions

in their proper perspective, illustrates that the Supreme Court was merely attempting to obtain uniformity rather than broaden the district court's jurisdiction.

Diversity must be present between all plaintiffs and all defendants or the Federal Courts do not have jurisdiction on their civil or law side. This is too well established to require argument.

Indianapolis et al. v. *Chase National Bank, Trustee, et al.*, 314 U. S. 63, 69 (1941);
Treinies v. *Sunshine Mining Co.*, 308 U. S. 66, 71, (1939);
Camp v. *Gress*, 250 U. S. 308, 312, (1919).

That diversity was not present as petitioner was a Spanish national and citizen, and respondent Compania Trasatlantica was a Spanish corporation.

POINT VI

There is no claim in the complaint for "earned wages". Section 597 of Title 46 of the United States Code has no application.

Petitioner does not claim in his complaint that "wages earned" by him have not been paid. The complaint merely states a cause of action in damages "under General Maritime Law" "for wages to the end of the voyage and for a time thereafter" (R. 200a-R. 201a):

> "Fifteenth: That upon information and belief, plaintiff having become injured and ill as aforesaid, it was the duty of the defendants herein to

pay for the expense of the plaintiff's maintenance and cure, and to pay him wages to the end of the voyage and for a time thereafter, for all of which the defendants are obligated by General Maritime Law."

It is important to note that this cause of action is specifically stated to be based on "General Maritime Law" and not on Section 597 of Title 46 of the United States Code. This is the statute involved in *Strathearn SS Co.* v. *Dillon,* 252 U. S. 348, 1920, relied upon by petitioner in Point IV of his brief, page 57, "Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction".

This Section cannot apply to this claim "for wages to the end of the voyage and for a time thereafter" for it deals only with "wages which * * * have been earned" and which have been demanded from the master by the seaman. It reads:

"§ 597. Payment at ports

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided,* Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on

the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in the preceding section: *Provided further,* That notwithstanding any release signed by any seaman under section 644 of this title any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further,* That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts. R. S. § 4530; Dec. 21, 1898, c. 28, §§ 5, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, § 4, 38 Stat. 1165; June 5, 1920, c. 250, § 31, 41 Stat. 1006."

The claim for "wages to the end of the voyage and for a time thereafter" is simply another element in a claim for damages arising out of petitioner's injury and based on "General Maritime Law", and not on a statute. Accordingly, what has been said in this brief in Point I respecting petitioner's right to sue under the General Maritime Law of the United States in Point V respecting jurisdiction on the civil side of the Federal Courts applies in all respects to this claim.

POINT VII

The Spanish Treaty did not create any right in the plaintiff to maintain suit under the Jones Act or under the General Maritime Law of the United States.

Article VI of the Spanish Treaty referred to by petitioner (Appendix to Petitioner's Brief, page 62) provides that Spanish subjects "shall have free access to the Courts" of the United States. Petitioner does not argue that appellant is not free to bring a suit in an American court. The procedure of American courts is open to him without treaty. An alien has never been denied recourse to our courts.

But Article VI created no substantive right in petitioner to maintain action under the Jones Act or under the General Admiralty Law of the United States. It provides only that he shall enjoy "in what concerns

1. arrest of persons
2. seizure of property
3. and domiciliary visits to their houses, manufactories, stores, warehouses, etc.

the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored nation".

No other rights under American law, either statutory or at common law, are conferred on petitioner by Article VI. Certainly it cannot be argued that the

language of Article VI conferred any right in him to maintain action in our courts under the Jones Act. And it can well be argued that the failure to confer any additional rights, other than those specified, negatived the existence of any other rights.

Article XXIII of the treaty (Appendix to Petitioner's Brief, Page 63) granted to the Spanish Consuls exclusive charge of the "internal order" of Spanish ships. It reserved to the Consuls and the Courts of Spain the resolution of differences between Captains, officers and crew. Disorders were to be dealt with exclusively by these bodies unless they threatened to cause a breach of peace. American authorities were to furnish aid to the Consuls in searching for, arresting, etc. crew members. Arrests were only to be made on the request of the Consuls, the Spanish authorities or the Courts of Spain. Release of persons arrested was to made at the mere request of such authorities.

Article XXIII neither establishes nor cuts off any substantive American right to recover for injury. None are even mentioned or referred to in it. It seems futile, therefore, for petitioner to argue that its abrogation restored or created a substantive right in him under the General Admiralty Law or under the Jones Act to recover for injury.

Article XXIII did not reserve to the Spanish Consuls, jurisdiction over or settlement of the rights of Spanish seamen arising out of injury aboard Spanish vessels. Such rights are nowhere mentioned in the Article. It is impossible, therefore, to urge that the abrogation of this Article took away from the Consuls

jurisdiction over such rights or that its abrogation created some right under American law in Spanish seamen to recover for injury.

The Court of Appeals correctly held that nothing in the text of these Articles conferred any substantive right. And the Court of Appeals also correctly held that nothing in these Articles supported petitioner's assertions respecting the jurisdictional questions involved.

In no event could the Treaty be construed to waive the jurisdictional requirements of our District Courts.

POINT VIII

The District Court properly declined discretionary jurisdiction in admiralty.

The District Court in declining discretionary jurisdiction in admiralty, stated (R. 252a):

> "In the light of the finding hereinabove that under Spanish Law the plaintiff may have compensation for his injury with an additional amount if the defendant Compania is found to have been negligent, and that plaintiff is also accorded under Spanish Law the counterpart of maintenance and cure and that he may assert his claims to a Spanish Consul here, this court should and does decline jurisdiction even in admiralty as a matter of discretion."

There was no error in this holding and it is amply supported by authority.

Canada Malting Co., Ltd. v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932), at pp. 420-423:

"* * * The doctrine of these earlier cases was recently reiterated by this Court, in similar terms, in Langnes v. Green, 282 U. S. 531, 544, where it was said: 'Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, "the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum".' See also Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U. S. 515, 517.

The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences, or to claims of personal injury. Although such cases are ordinarily decided according to the foreign law, they often concern causes of action arising within the territorial jurisdiction of the United States, compare Patterson v. The Eudora, 190 U. S. 169; The Kestor, 110 Fed. 432, 450."

Petterson v. *The Bertha Brovig*, 92 F. Supp. 895 (D. C., S. D., 1950), p. 896:

"American courts have extended themselves to

protect an alien seaman where his circumstances substantially deny vindication and recovery of a just claim. The Apurimac, D. C., 7 F. 2d 741, affirmed sub. nom., Heredia v. Davies, 4 Cir., 12 F. 2d 500. That was the case of a Peruvian where no Peruvian law to which he could have recourse was submitted to the Court. In this case it is demonstrated without contradiction that under the Norwegian law even in the event of permanent injuries, if libellant can show an inability to reach Norway to press his claim, the Consul General here may entertain and determine it. The size of his recovery, if he obtains one, will not comport with the standards to which American seamen are used but it will be of the size that will represent the obligation which he agreed the vessel assumed in signing him on. We are unable to discover any authority that would serve as a satisfactory precedent for taking jurisdiction in the circumstances and that is one of the norms to guide a Judge in exercising his discretion. The Apurimac, supra, 7 F. 2d at page 501."

Johansson v. *O. F. Ahlmark & Co.*, 107 F. Supp. 70 (D. C., S. D., 1952), p. 71:

"The Jones Act is inapplicable to a suit by a foreign seaman who signs articles in a foreign port for service on a foreign ship even if he is injured aboard ship in an American port. The papers submitted fail to show where the instant voyage terminated, but no authority can be found to indicate that if the voyage did end in the United States, that factor alone would justify an exception to the rule. Accordingly, the exception

to the first cause of action under the Jones Act is sustained.

Treating now the first cause of action as a claim for indemnity under the maritime law based on unseaworthiness and the second cause of action for maintenance and cure, entertainment of this suit is a matter of discretion. In the exercise of this discretion, inquiry must be made whether justice will be as well done by remitting the parties to their home forum. If so, jurisdiction will be declined.

It appears that libelant has received and is entitled to substantial benefits in the nature of compensation for his injuries, under the law of Sweden. No injustice will be done if he is left to those remedies."

Koziol v. *"The Fylgia"*, 230 F. 2d 651 (Second Circuit, 1956):

"Libellant, a Polish merchant seaman, signed shipping articles in Argentina on November 7, 1950, to serve as a messman aboard the respondent S. S. Fylgia, a Swedish vessel, and was injured while at sea on November 19, 1950, in descending a stairway on the ship. He has brought to the court below a total of one civil action and three libels, in all of which Judge Clancy has successively refused to take jurisdiction. Originally he made claim under the Jones Act, 46 U. S. C. A. § 688, but appears at present to have given that up, since it is now clear that that Act is not applicable. Lauritzen v. Larsen, 345 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254. Later libels have been based on the general maritime law. It is settled law, however, that the district court

had discretion to refuse jurisdiction of this suit in admiralty between foreign nationals; and this discretion will not be reviewed except for abuse. Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 418, 52 S. Ct. 413, 76 L. Ed. 837; United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika og Australie Line, 2 Cir., 65 F. 2d 392. Attempts of libellant to show some compulsion to accept such claims based on various enactments favoring seamen, such as that allowing seamen to sue without prepaying fees or costs or furnishing security, see 28 U. S. C. § 1916, revising the former § 837, are wholly unconvincing. And there is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libellant's rights would be adequately, if not better, adjudicated in Swedish tribunals."

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

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